

# CIVILIAN NON-COMBATANTS FEARING PERSECUTION IN CIVIL WAR SITUATIONS

## GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE *IMMIGRATION ACT*

Immigration and Refugee Board  
Ottawa, Canada  
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### THE ISSUE

Claims made by civilian non-combatants fearing return to situations of civil war come before the Refugee Division on a regular basis. These Guidelines address the particular difficulties raised in such claims. In claims involving situations of civil war, as in all other refugee claims, the claimants must satisfy all of the elements of the statutory definition of Convention refugee.<sup>1</sup> A major difficulty encountered in analyzing these claims is determining whether or not a linkage exists between the persecution feared and one or more of the Convention grounds.

The Refugee Division, in interpreting the definition of Convention refugee, has determined in many cases that civilian non-combatants fearing return to situations of civil war are included within the definition of Convention refugee. On the other hand, in a limited number of decisions, the Refugee Division has come to an opposite conclusion. It should be observed that paragraph 164 of the UNHCR *Handbook*,<sup>2</sup> which while persuasive is not binding on the Refugee Division, notes that persons who are compelled to leave their country of origin as a result of international or armed national conflicts are not normally considered Convention refugees. The Federal Court has provided some assistance in dealing with cases that arise within the context of civil war. However, there is still a degree of uncertainty in analyzing these claims; hence the need for these Guidelines.

A general proposition which underlies the analysis of issues in civil war claims is the following:

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### General Proposition

**There is nothing in the definition of Convention refugee which excludes its application to claimants fearing return to situations of civil war.<sup>3</sup> Conversely, those fearing return to situations of civil war ought not to be deemed Convention refugees by that fact alone.**

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- In these Guidelines, the feminine includes the masculine.

These Guidelines specifically seek to address the following issues in relation to claims made by civilian non-combatants fearing return to situations of civil war:

### First Issue

Does the harm feared constitute "persecution" within the definition of Convention refugee?

### Second Issue

What principles should decision-makers apply when determining whether the claimant's fear of persecution is based on one or more of the grounds set out in the definition of Convention refugee?

### Third Issue

What factors should be considered in determining whether the claimant's fear of persecution is well-founded?

### Fourth Issue

What are the key evidentiary elements that decision-makers should look to when considering a claim arising out of a situation of civil war?

## THE ANALYSIS

### I. ASSESSING THE HARM FEARED

It is necessary to assess the particular circumstances which have given rise to the claimant's fear of persecution. **Does the harm feared constitute "persecution" within the definition of Convention refugee?**

A person taking no active part in the hostilities associated with a civil war should be treated by the combatants humanely without adverse distinction.<sup>4</sup> Her human rights must be respected. If the combatants treat the person in a manner that is contrary to these principles, such treatment can, depending on the claimant's particular circumstances, constitute persecutory treatment. **When one is determining whether the case is one of "persecution", the question to be addressed is whether there are violations of human rights of sufficient degree and importance to constitute persecution.**<sup>5</sup> The fact that the treatment feared by the claimant arises from the hostility felt, or the violence engaged in, by combatants directly involved in the civil war does not exclude the possibility that it could constitute persecution.

International instruments are not binding on the Refugee Division unless they are incorporated into Canadian law.<sup>6</sup> However, even if a particular instrument has not been so incorporated, the principles enunciated in the instrument may assist in the application of the definition of Convention refugee. Also, the standards set out in an instrument may assist the Refugee Division in determining permissible conduct even if the instrument is not binding upon the parties to the conflict. By defining permissible conduct, the instruments may assist the Refugee Division in assessing whether or not the treatment constitutes persecution as that term is understood in Canadian case law.

Accordingly, in determining what are the fundamental human rights that must be considered in assessing persecution within the context of civil war, reference should be made to international human rights instruments which provide a framework of international standards for recognizing the protection needs of individuals. Such international human rights instruments include, but are not limited to:

- i) *Universal Declaration of Human Rights*
- ii) *International Covenant on Civil and Political Rights*
- iii) *International Covenant on Economic, Social and Cultural Rights*
- iv) *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

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In addition, international instruments exist that relate to the protection of civilians in time of war. These instruments should be considered as they may assist the Refugee Division in determining what constitutes permissible conduct by combatants toward non-combatants, and they may therefore assist the Refugee

Division in determining whether the conduct constitutes persecution. These instruments include, but are not limited to:

i) *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (the "1949 Convention")*

ii) *Protocol II to the 1949 Convention ("Protocol II")*

Article 3 of the *1949 Convention* prohibits in relation to non-combatants certain acts including:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- taking of hostages;
- outrages upon personal dignity, in particular humiliating and degrading treatment.

Article 4 of *Protocol II* prohibits in relation to non-combatants certain acts including:

- violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- collective punishments;
- taking of hostages;
- acts of terrorism;
- outrages on the personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.

Article 13 of *Protocol II* provides that the "civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations." To give effect to this protection, certain rules, including the following are to be observed:

- the civilian population, as well as individual civilians, shall not be the object of attack;
- acts or threats of violence the primary purpose of which is to spread terror among the civil population are prohibited.

## II. DETERMINING WHETHER PERSECUTION IS BASED ON A CONVENTION GROUND

### General principles - Federal Court of Appeal

The determination of whether there is a link between the persecution experienced or feared by the claimant, or her group, and the grounds for persecution found in the definition, has generally proved to be the most difficult aspect of applying the definition in claims arising from civil war.<sup>8</sup> In considering this issue, it is useful to commence the analysis by reference to the two leading decisions of the Federal Court of Appeal. The first of these is *Salibian v. M.E.I.*,<sup>9</sup> which at p. 258 sets out four general principles:

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

- (1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;
- (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
- (3) **a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a**

**group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition;** and (4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin ... [emphasis added]

The Court goes on to adopt the following statement by Professor Hathaway:<sup>10</sup>

In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. **In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.** [emphasis added]

The second case is the very brief decision in *Rizkallah v. M.E.I.*,<sup>11</sup> where the Court of Appeal held that:

To succeed, **refugee claimants must establish a link between themselves and persecution for a Convention reason.** In other words, they must be **targeted** for persecution in some way, either personally or collectively. ... the evidence, as presented to us, falls short of establishing that Christians in the claimant's Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war. [emphasis added]

The third general principle set out in *Salibian* was commented upon by the Court of Appeal in *Hersi, Nur Dirie v. M.E.I.*,<sup>12</sup> when the Court, on consent, held that the Refugee Division erred "in holding that refugee claimants must be able to show they are at some greater differential risk than other members of their group", a conclusion which the Court found to be at odds with its decision in *Salibian*.

### **Approaches to Analysis of Civil War Claims**

The case law emanating from the Trial Division of the Federal Court seems to suggest that the Trial Division has taken two different approaches to civil war claims. The differences pertain to the question whether there is a nexus between the harm feared and one of the Convention grounds, and to the application of *Salibian* and *Rizkallah*.

#### **Non-comparative Approach**

The non-comparative approach to the assessment of a claim is the approach advocated in these Guidelines. This approach is more in accord with the third principle set out in *Salibian*, the decisions of the Court of Appeal in *Rizkallah* and *Hersi, Nur Dirie*, as well as the wording of the Convention refugee definition.<sup>13</sup> With this approach, instead of an emphasis on comparing the level of risk of persecution between the claimant and other individuals (including individuals in the claimant's own group) or other groups, the Court examines the claimant's particular situation, and that of her group, in a manner similar to any other claim for Convention refugee status.

The issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war.<sup>14</sup> A claimant should not be labelled as a "general victim" of civil war without full analysis of her personal circumstances and that of any group to which she may belong. Using a non-comparative approach results in a focusing of attention on whether the claimant's fear of persecution is by reason of a Convention ground.

## Comparative Approach

The other approach to assessment of the claim is comparative. This approach considers whether the claimant, or her group, is at a "differential risk" when compared to other individuals or groups in the country of origin.<sup>15</sup> This approach appears to involve a consideration of the predicament faced by the claimant, or her group, as compared with the circumstances of other persons in her country of origin who face harm from the same or other agents of persecution. In other words, is the claimant's, or her group's, predicament worse or different than the predicaments of others in her country of origin?<sup>16</sup>

The clearest adoption of the comparative approach has been in *Isa v. S.S.C.*<sup>17</sup>

## Conclusion

These Guidelines advocate the use of the non-comparative approach, as this approach promotes the case law in *Salibian, Rizkallah* and *Hersi, Nur Dirie*. The Guidelines do not recommend the use of any form of "differential risk" analysis. It can lead to the use of a comparative approach, where the requirement that the claimant, or her group, be exposed to hardship which is greater than the hardship of others in the country of origin, may be difficult to reconcile with certain passages in *Salibian, Rizkallah* and *Hersi, Nur Dirie*. In addition, the comparative approach may be difficult to reconcile with the Convention refugee definition.

## Application of the Non-Comparative Approach: Relevant Principles

To succeed, refugee claimants must establish a link between themselves and persecution on a Convention ground. In other words, they must be targeted for persecution in some way, either personally or collectively.<sup>18</sup> Inasmuch as persecutory measures are often directed at groups rather than individuals, the claimant need not be personally identified ("singled out") or targeted for persecution in order to be determined a Convention refugee.<sup>19</sup>

Where the persecution which has occurred, or the possibility of persecution in the future, is directed at the claimant's group as a whole rather than each individual member of the group, it is the fact of membership in the group which provides the foundation for the fear. Where the targeting is due to the possession of a certain characteristic related to a Convention ground, then all those who possess the characteristic may be at risk of harm by reason of their possession of that characteristic.<sup>20</sup> In such a case, the linkage to a Convention ground is not negated by the fact that the persecutor does not "discriminate" between one possessor of the characteristic and another possessor of the same characteristic. What is important is that the group is targeted, or there is a reasonable possibility of targeting of the claimant or the group in the future. Moreover, the number of persons in the group is irrelevant.

Targeting should be considered from the perspective of the agent of persecution, i.e. the intention of the agent of persecution must be examined. The Supreme Court of Canada has clarified that the examination of the circumstances of a case, including the intention of the agent of persecution, should be approached from the perspective of the agent of persecution, since it is this perspective that is "determinative in inciting the persecution."<sup>21</sup>

Where the intention of the agent of persecution to target a claimant, or her group, is clear from the evidence, it will be a straightforward matter to determine whether there is a link to one of the Convention grounds. Where the intention is not clear on the particular facts of the case, the link to a Convention ground may be inferred from the effect that the actions of the agent of persecution have on the claimant or her group.

A civilian non-combatant should not be fixed with a share of "collective guilt" because combatant members of the claimant's group are inflicting harm on members of other groups.<sup>22</sup> Such actions should not disqualify a claimant from refugee status if she otherwise fulfils the definition. As noted in *Isa*, there should be a recognition that civil wars are often waged for reasons found in the Convention grounds. **In applying *Salibian* and *Rizkallah*,**

**the Guidelines recommend that a decision-maker should exercise caution before determining that a linkage to a Convention ground does not exist in such a case.** The fact that all persons on either side of the conflict may come within the definition, should not disqualify a claimant where that claimant has a well-founded fear of persecution based on a Convention ground.

In considering whether a linkage to a Convention ground exists, it is useful for decision-makers to reflect on the following comments made by Dr. Joachim Henkel, Judge, German Federal Administrative Court with respect to the "general consequences" of civil war.<sup>23</sup>

The general rule that the Geneva Refugee Convention does not provide protection against the general consequences of civil war is correct, but is often applied too broadly. Certainly, the danger of being caught up in the fighting and thus losing one's life more or less by accident is a general consequence of civil war. Furthermore, the danger of losing [sic] a limb by treading on a land mine is a general consequence of civil war. Lack of food and water, lack of electricity and heating, lack of medical treatment and many other sufferings are general consequences of civil war. But, in my view, it amounts to persecution if one of the warring [sic] parties as part of its strategy subjects the female members of the enemy community to wide-spread rape; if the warring [sic] parties resort to the practice of "ethnic-cleansing"; if the warring [sic] parties detain all male members of the enemy community in concentration camps in which they are abused and ill-treated; if one of the warring [sic] parties after having captured a city takes to killing even civilian members of the enemy community. Even though such atrocities may be common in today's civil wars they clearly are directed against persons as individuals; they are not just the unavoidable more or less anonymous consequences of a war. Thus, if one of the warring [sic] parties singles out a person or a group of persons for reasons of race, political opinion or one of the other elements enumerated in the refugee definition and subjects it to serious human rights violations this clearly constitutes persecution...

## **CATEGORIES OF CLAIMS ENCOUNTERED**

In considering the issue of whether the persecution feared is based on a Convention ground, it is beneficial to highlight the types of claims seen in the civil war context. Claims arising within civil war situations may be divided into three broad categories:

1. *Fear of persecution in a generalized civil war:*
  - a) *Individualized harm that is distinguishable from the general dangers of civil war.*
  - b) *Group-based harm that is distinguishable from the general dangers of civil war.*
  - c) *Harm that is not distinguishable from the general dangers of civil war.*
2. *Fear of persecution arising from a civil war specifically directed against a group with which the claimant is affiliated.*
3. *Fear of persecution from circumstances unrelated to the civil war.*

These categories have been identified as they delineate factual situations within which we find the majority of civil war claims. When such claims are considered within these categories, the linkage between the harm feared and the Convention grounds is more readily discernible. The examples set out below are not meant to be exhaustive of the situations that might come within a particular category.

### **1. Fear of persecution in a generalized civil war.**

**A) Individualized harm that is distinguishable from the general dangers of civil war:**

Certain individuals, although not taking any part in the hostilities, may nevertheless face a reasonable chance of persecution<sup>24</sup> because of their civil or political status, or due to a status which is imputed to them by combatants in the civil war. For example:

- (1) persons facing persecution for refusing to join either side in the armed struggle out of a desire to remain neutral, a conscious political choice or other valid reasons of conscience;<sup>25</sup>
- (2) human rights activists, journalists or other citizens threatened with measures of persecution for investigating and/or criticizing military, paramilitary or guerilla activities and atrocities;
- (3) persons fearing persecution for certain views attributed or imputed to them, such as "sabotaging the war efforts" or "collaborating with the enemy".<sup>26</sup>

**B) Group-based harm that is distinguishable from the general dangers of civil war:**

Although the civil war has an adverse impact on the entire population, a particular racial, national, religious, social or political group may face a reasonable chance of persecution because of the group's identifying characteristic(s). For example:

- (1) members of an ethnic group might face persecution as a result of, for example, selective denial of state protection related to their ethnicity;
- (2) women and children may, because of their social or political role or because of their association with certain individuals (including family members) be targets of deliberate violence and abuse;<sup>27</sup>
- (3) members of a clan might be perceived as associated with another clan that had ruled the country prior to the civil war and might by reason of that perceived association, face persecution.<sup>28</sup>

**C) Harm that is not distinguishable from the general dangers of civil war.**

As noted above, certain individuals and groups may face a reasonable chance of persecution on a Convention ground, notwithstanding the civil war's adverse impact on the entire population. On the other hand, there will be circumstances where the persecution feared may not be linked to a Convention ground. Reference is then made to the unavoidable, more or less anonymous consequences of a civil war. For example:

- (1) civilians who are the unintentional victims of cross-fire between rival militias. The lack of an intention on the part of either of the rival militias leaves the civilians as "mere victims" of the civil war as there is no linkage between the harm feared and a Convention ground;<sup>29</sup>
- (2) civilians who are the unintentional victims of arbitrary, general or indiscriminate shelling and bombing or laying of land mines where the fear of such treatment is not linked to a Convention ground;<sup>30</sup>
- (3) civilians who are subject to random violence, such as looting, where the violence is not related to a Convention ground.<sup>31</sup>

**2. Fear of persecution arising from a civil war specifically directed against a group with which the claimant is affiliated.**

The violence is directed at a group that differs from the rest of the population by virtue of specific racial, national, social or political features. For example:

- (1) members of an ethnic group against which a genocidal campaign is being waged;
- (2) members of a religious faith expelled from their homes and suffering other forms of persecutory treatment as part of an "ethnic cleansing" agenda.<sup>32</sup>

**3. Fear of persecution from circumstances unrelated to the civil war.**

Although the claimant comes from a country in civil war, the danger faced by the claimant is not associated, directly or indirectly, with that war. However, the claimant may still be a Convention refugee if the fear of persecution is related to one of the five grounds. In this situation the claim should be determined without reference to the civil war framework. For example:

- (1) union leaders threatened with measures of persecution for promoting unionism;
- (2) members of a minority group treated in a persecutory manner, where such treatment or lack of protection is not related to the civil war.

### III. DETERMINING WHETHER THERE IS A WELL-FOUNDED FEAR OF PERSECUTION

It is clear from the case law that a claimant must establish that her fear is well founded, and that the state's inability to protect must be considered at this stage of the analysis of the claim. In addition, the Supreme Court of Canada in *Ward* confirmed that a claimant is to seek out international protection only when national or state protection is unavailable.<sup>33</sup> The claimant must seek the protection of the country of origin before seeking international protection, unless it is objectively unreasonable to do so.<sup>34</sup>

The question, which must be addressed by the Refugee Division, is whether the claimant faces a reasonable chance of persecution by reason of a Convention ground: Is there a subjective fear for which there is an objective basis? As previously stated in these Guidelines, it is not required that the claimant's chance of facing persecution, individually or as a member of a group, be greater than the chance of persecution faced by others in situations of civil war; nor is it required that the persecution feared by the claimant be more severe than that feared by others.

#### State Protection

A state's ability to protect the claimant is a crucial element in determining whether the fear of persecution is well founded, and as such, is not an independent element of the definition of Convention refugee. The Supreme Court of Canada in *Ward* held that there were two presumptions at play in refugee determination. With respect to the first presumption, the Court concluded that it can be presumed that persecution will be likely and the fear well-founded if the fear of persecution is credible and there is an absence of state protection. As a second presumption the Court held that except in situations where the state is in a condition of complete breakdown, states must be presumed capable of protecting their citizens. The Court found that this presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.<sup>35</sup>

The presumption that a state must be presumed capable of protecting its citizens can be rebutted where there is a complete breakdown of state apparatus, such as that recognized in *Zalzali v. M.E.I.*<sup>36</sup> in relation to the civil war, then raging, in Lebanon. However, even where there is a breakdown of state apparatus,<sup>37</sup> there may be several established authorities in a country able to provide protection in the part of the country controlled by them.<sup>38</sup> Thus, the Refugee Division must consider whether there is an established authority from which protection may be sought and adequate protection is available.<sup>39</sup>

#### Internal Flight Alternative

Even when a claimant otherwise meets all the elements of the Convention refugee definition in her home area of her country of origin,<sup>40</sup> the claimant may have an internal flight alternative (IFA) elsewhere in that country: **If there is an IFA, the claimant is not a Convention refugee.** The question of whether a IFA exists is an integral part of the

Convention definition.<sup>41</sup> If it is necessary to consider the availability of an IFA, reference may be made to the *Commentary* on IFA.<sup>42</sup>

The key concepts concernin IFA come from two cases: *Rasaratnam and Thirunavukkarasu*.<sup>43</sup> From these cases it is clear that the test to be applied in determining whether there is a IFA is two-pronged. Both prongs must be satisfied for there to be a finding that the claimant has an IFA. The Court of Appeal in *Rasaratnam* at pp. 709-11 adopts the two-pronged test:

1. The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds a IFA exists.
2. Moreover, conditions in the part of the country considered to be a IFA must be such that it would be not unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.<sup>44</sup>

In determining whether there is a reasonable chance of persecution in the potential IFA, the factors considered are similar to those evaluated when the panel makes this finding with respect to the claimant's home area of the country. However, some considerations are different in order to account for the fact that the claimant is being expected to seek out alternative refuge in the country of origin.<sup>45</sup>

In dealing with the second prong of th IFA test, "reasonableness in all the circumstances", the Court of Appeal has stated that the circumstances must be relevant to th IFA question: "They cannot be catalogued in the abstract. They will vary from case to case."<sup>46</sup>

The Trial Division has provided some guidance in assessing the reasonableness of an IFA. In the civil war context, the Court has indicated that relevant factors include the state of infrastructure and economy in th IFA region (i.e. destroyed or not), and the stability or instability of the government that is in place there.<sup>47</sup> In addition, it may be necessary to consider the hardship in travelling to th IFA region.

**A claimant should not be required to suffer great physical danger or undue hardship in travelling to the IFA region or in staying there.<sup>48</sup> However, if there is an IFA, the claimant is not a Convention refugee.**

#### IV. EVIDENTIARY MATTERS

When assessing a fear of persecution by a person fearing return to a situation of civil war the evidence must show that what the claimant fears is persecution on a Convention ground and that the fear is well-founded. The burden is on the claimant to provide the Refugee Division with credible or trustworthy evidence to show that all elements of the definition have been met; this includes establishing that there is individual or group targeting on a Convention ground.

Evidence can be provided through the claimant's own testimony. In addition, this can be done by the use of witnesses (including experts) to provide evidence on country conditions relating to targeting; such evidence can be introduced by way of affidavit in lieu of oral testimony.<sup>49</sup> The Refugee Division may take notice of any facts that may be judicially noticed and, subject to giving proper notice, of any other generally recognized facts and any information or opinion that is within its specialized knowledge.<sup>50</sup>

One way for the claimant to establish her case can be through evidence that other similarly situated persons face a reasonable chance of persecution, whether or not that chance is

applicable to a specific group only or to large segments of the population similarly situated to the claimant.<sup>51</sup>

Refugee Claim Officers under the direction of the panel and Counsel should submit documentary evidence to provide evidence of country conditions relating to targeting. **There should be recognition by the Refugee Division of the difficulty that is often encountered in acquiring information on country conditions when a country is embroiled in a civil war.** Notwithstanding that a claimant has the burden of establishing her claim, Refugee Division panels should consider the statements in the UNHCR *Handbook* at paragraph 196 on the shared burden of information gathering.

...Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.<sup>52</sup>

In addition, there should be recognition that, given the rapidly changing country conditions generally associated with civil wars, there may be problems with the timeliness of evidence and problems encountered in obtaining current information with respect to those changes. Accordingly, Refugee Claim Officers under the direction of the panel and Counsel should seek out and submit to the hearing the most current information relating to country conditions.

## FRAMEWORK OF ANALYSIS

1. Assess the particular circumstances which have given rise to the claimant's fear of persecution. Does the harm feared constitute persecution?

For the treatment to amount to persecution, it must be a serious form of harm which detracts from the claimant's human rights and fundamental freedoms. The degree and importance of the rights and freedoms violated must be examined in relation to how the concept of persecution has been defined in Canadian jurisprudence. One objective standard is provided by international human rights instruments and international instruments that relate to the position of civilians in non-international armed conflicts. However, Canadian jurisprudence on the definition of persecution is not restricted to the violation of rights or interests protected in such international instruments.

2. Is the harm feared as a result of the targeting of the claimant or her group on the basis of any one, or a combination, of the grounds in the definition of Convention refugee? Alternatively, the question can be posed: Is the claimant's fear of persecution based on any one, or a combination, of the grounds enumerated in the definition of Convention refugee? **Considerations:**

- *the intention of the agent of persecution must be assessed*
- *intention may be inferred from the effect that the actions of the agent of persecution have on the claimant or her group*
- *a claimant need not be individually targeted for persecution*
- *it is necessary to ascertain the characteristic which places the claimant or members of her group at risk and the linkage to a Convention ground*
- *the level of risk of persecution should not be compared to that of other individuals or groups in the country of origin*

- *as civil wars are often waged for reasons related to a Convention ground, caution should be exercised before determining that there is not a linkage to a ground*
3. Determine whether, under all the circumstances, the claimant's fear is well-founded. This includes an assessment of the evidence related to the availability of adequate state protection and whether there is an objective basis to the claim. **Considerations:**
    - *is there an established authority from which protection may be sought and adequate protection is available?*
    - *recognition of the difficulty of acquiring information on country conditions is important*
    -
  4. If required, determine whether there is the possibility of an internal flight alternative (IFA), or whether other issues require analysis. **Considerations:**
    - *the state of infrastructure and economy in th IFA region (i.e. destroyed or not), and the stability or instability of the government that is in place there*
    - *whether or not there would be undue hardship on the claimant, both in reaching the location of th IFA and in establishing residence there*
    - *if there is an IFA, the claimant is not a Convention refugee*

## ENDNOTES

1. In a claim before the Refugee Division, it is not unusual to address various issues which form part of the assessment of the claim for Convention refugee status. These issues can include: change of circumstances in the home country; internal flight; and the application of Articles 1E or 1F of the Convention (the "exclusion clauses"). Such issues should be dealt with following the appropriate legal principles. Section 2(1) of the *Immigration Act (the "Act")* provides that a person who comes within the exclusion clauses is not within the definition of Convention refugee. Similarly, the definition does not include a person who has ceased to be a Convention refugee by virtue of section 2(2) of the *Act*. While these Guidelines do not deal with the application of the exclusion clauses, and for that reason there is no reference to them in the framework of analysis, it must be noted that there may be circumstances where a claimant, even though she was a civilian non-combatant, will come within the exclusion clauses, and as such will be excluded from the definition of Convention refugee.
2. In paragraph 164 of the *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, Geneva, January, 1988 (the "*UNHCR Handbook*"), which while persuasive is not binding on the Refugee Division, it is noted that:

Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol. They do, however, have the protection provided for in other international instruments, e.g. the Geneva Conventions of 1949 on the Protection of War Victims and the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the protection of Victims of International Armed Conflicts.

In considering the intention of the drafters of the Convention, James C. Hathaway in *The Law of Refugee Status* (Toronto: Butterworths, 1991) notes at p.185, the statement of Mr. Robinson of Israel (U.N. Doc. A/CONF.2/SR.22, at 6, July 16, 1951) as follows:

The text...obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, flood, earthquakes or volcanic eruptions, for instance, *differentiated between their victims* on the grounds of race, religion, or political opinion. Nor did the text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by Article 1 of the Convention. [emphasis added by Professor Hathaway]

3. The underlying issue is discussed in *Refugees in Civil War Situations*, UNHCR Branch Office, Ottawa, November, 1990 where the following is set out:

It should be noted at the outset that individuals are considered refugees when they flee or remain outside a country for reasons pertinent to refugee status. Whether these reasons arise in a civil war situation, in international armed conflict or in peace time, is irrelevant. **There is nothing in the definition itself which excludes its application to persons caught up in a civil war.** [emphasis added]

4. See common article 3(1) of each of the four *Geneva Conventions of 1949* discussed *infra*. These Guidelines relate to civilians with no direct participation in the hostilities. Where a claimant provided indirect support to combatants such as supplying food, money or shelter, these actions should not have taken the claimant outside of the category of non-combatant. Any sanction imposed, or threatened to be imposed, against the claimant would have to be considered in relation to the activity engaged in by the claimant; disproportionate punishment could be found to be persecutory as that could be found not to be a legitimate imposition of a sanction. Generally, a threat to life, liberty or security of the person is persecutory regardless of the context. (However, to be within the definition, there must be a link to a Convention ground.) On the other hand, in *Antonio, Pacato Joao v. M.E.I.* (F.C.T.D., IMM-1072-93), Nadon, September 27, 1994, the Court, in an Angolan claim, was not prepared to conclude that the death penalty when imposed for treason and sabotage constituted persecution.
5. As noted in paragraph 51 of the UNHCR *Handbook*: "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success." The concept of persecution has been described on a number of occasions in Canadian case law. One such description is "the systemic and persistent infliction of threats and injury" [*Rajudeen v. M.E.I.* (1984), 55 N.R. 129 (C.A.) at pp. 133-4]; another description requires an element of repetition and relentlessness which an isolated incident can satisfy only in very exceptional circumstances [*Valentin v. M.E.I.*, [1991] 3 F.C. 390 (C.A.)]. The Supreme Court of Canada has stated that persecution, although undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection." [*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at p. 734]. It should be noted that in *Murugiah, Rajendran v. M.E.I.* (F.C.T.D., no. 92-A-6788), Noël, May 5, 1993 and *Rajah, Jeyadevan v. M.E.I.* (F.C.T.D., no. 92-A-7341), Joyal, September 27, 1993 the Federal Court Trial Division certified the following questions for consideration by the Federal Court of Appeal: whether persecution requires systematic and persistent acts, and whether one or two violations of basic and inalienable rights such as forced labour or beatings while in police detention is enough to constitute persecution.
6. For more on this issue, see Anne F. Bayefsky, *International Human Rights Law -Use in Canadian Charter of Rights and Freedoms Litigation* (Markham: Butterworths, 1992).

7. Common article 3 of each of the four *Geneva Conventions of 1949* sets out the minimum conduct of each party to an armed conflict of a non-international character in all circumstances of the conflict. Where a claimant has adduced credible or trustworthy evidence that there is a reasonable chance that she would face a violation of any of the provisions in this article, a panel would need to assess whether the action constituted persecutory treatment. Violations of non-derogable rights found in common article 3 likely would lead to a finding of persecution. See also Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95, "Legal Analysis based on the needs of Internally Displaced Persons" prepared on behalf of the American Society of International Law and the International Human Rights Law Group, Washington D.C., U.S.A. by Janelle M. Diller, Robert K. Goldman and Cecile E.M. Meijer (Working Draft in Progress), January 30, 1995, U.N. Doc. E/CN.4/1995/CRP.1 at pp. 47-54.

For a discussion on *Protocol II* see Charles Lysaght, "The Scope of Protocol II and its Relation to common article 3 of the *Geneva Conventions of 1949* and other Human Rights Instruments", *The American University Law Review*, Vol. 33, 1983, p. 9 and Sylvie Junod, "Additional Protocol II: History and Scope", *The American University Law Review*, Vol. 33, 1983, p. 29.

In considering the impact of international instruments on the position of children in a civil war situation reference should be made to article 4(3) of *Protocol II* and article 38 of the *Convention on the Rights of the Child*. For more on the issue, see Ilene Cohn, "The Convention on the Rights of the Child: What it means for Children in War", *International Journal of Refugee Law*, Vol. 3, No. 1, 1991, p. 100.

Where the claim involves a fear of gender-related persecution, reference should be made to the additional international instruments described in the Chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-related Persecution*, Immigration and Refugee Board, Ottawa, Canada, March 9, 1993 (*the "Gender Guidelines"*). It may be necessary to use these Guidelines as well as the Gender Guidelines to analyze a claim of a woman fearing persecution within the context of a civil war.

8. or a discussion of the approaches taken in the United States of America to the assessment of refugee claims involving civil war, see Peter Butcher, "Assessing Fear of Persecution in a War Zone", *Georgetown Immigration Law Journal*, Vol. 5, No. 1, 1991, p. 435. See also Michael G. Heyman, "Redefining Refugee: A Proposal for Relief for Victims of Civil Strife", *San Diego Law Review*, Vol. 24, 1987, p. 449; T. Alexander Aleinikoff, "The Meaning of "Persecution" in U.S. Asylum Law", *Refugee Policy - Canada and the United States* (Toronto: York Lanes Press Ltd., 1991), p. 292; Walter Kalin, "Refugees and Civil Wars: Only a Matter of Interpretation", *International Journal Of Refugee Law*, Vol. 3, No. 3, 1991, p. 435; and Mark R. Von Sternberg, "Political Asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns", *International Journal Of Refugee Law*, Vol. 5., No. 2, 1993, p. 153.
9. *Salibian v. M.E.I.*, [1990] 3 F.C. 250 (C.A.).
10. *Salibian* at p. 259.
11. In *Rizkallah v. M.E.I.* (1992), 156 N.R. 1 (F.C.A.), the Court determined that the appellants were merely victims of the civil war and found that there was no linkage between the harm feared and their religious status as Lebanese Christians. Lorne Waldman in *Immigration Law and Practice* (Toronto: Butterworths, 1992), Issue 5-

12/93, at p. 8.45 contrasts the result in *Rizkallah* to that of *Salibian* and *Ovakimoglu v. M.E.I.* (1983), 52 N.R. 67 (F.C.A.) in illustrating the difficulty in differentiating between a harm common to all persons living in a state of civil war and one that is linked to a Convention ground.

12. *Hersi, Nur Dirie v. M.E.I.* (F.C.A., no. A-1231-91), MacGuigan, Linden, McDonald, November 4, 1993.

13. Section 3(g) of the *Act* recognizes that Canadian immigration policy and the rules and regulations made under the *Act* should be designed and administered in a manner that fulfils Canada's international legal obligations with respect to refugees and the upholding of its humanitarian tradition with respect to the displaced and the persecuted. The definition of Convention refugee in the *Act* should be interpreted in a manner consistent with these objectives.

14. The Federal Court in *Hersi, Ubdi (Ubdi) Hashi v. M.E.I.* (F.C.T.D., no. 92-A-6574), Joyal, May 5, 1993 agreed with the Minister's argument that:

...The evidence of the applicants themselves speaks of general and indiscriminate shelling of cities and villages. Members of various clans become the victims, whether such clans could otherwise be regarded as friends or foes of the assailants.

A similar result was reached in *Siad v. M.E.I.* (1993), 21 Imm.L.R. (2d) 6 (F.C.T.D.) where the Court upheld the Refugee Division decision as,

It is clear that the Refugee Division concluded that the fear felt was that felt indiscriminately by all citizens [of Somalia] as a result of the civil war and random violence, and was not related to membership in a social group. (p. 11)

In *Khalib v. M.E.I.* (1994), 24 Imm.L.R. (2d) 149 (F.C.T.D.), the Court upheld a decision of the Refugee Division in which it concluded that the claimants' fear in relation to the danger from land mines was one faced indiscriminately by all people in the area notwithstanding that members of the Issaq clan may be concentrated there and form the majority in the area. It appears that the Refugee Division was not persuaded that "the mines were intended to harm only or even mainly the Issaqs living in the area of Hargeisa, and that the mines placed by a former government and not yet removed constitute grounds for fear, recognized by the Convention, of persecution by a government that is no longer in authority." (at p. 152)

In a brief decision, the Federal Court of Appeal in *Shereen, Agha Agha v. M.E.I.* (F.C.A., no. A-913-90), Mahoney, MacGuigan, Linden, March 21, 1994 held that a perceived political opinion is not to be ascribed to all individuals who find themselves victimized by government forces in a civil war even if they live in an area of insurgency. This case illustrates the need to provide supporting evidence as to targeting. The need to address the issue of targeting can be seen in *Ahmed, Faisa Talarer v. M.E.I.* (F.C.T.D., no. A-1017-92), Noël, November 2, 1993 and *Abdi, Jama Osman v. M.E.I.* (F.C.T.D., no. A-1089-92), Simpson, November 18, 1993 where, in both cases, decisions of the Refugee Division were found to be in error due to the failure to deal with documentary evidence which supported the claimant's position that the fear felt by the claimant was not the general fear felt by all in Somalia.

15. In a similar fashion, the Refugee Division has applied the concept of "differential risk" and "comparative differential risk" in the analysis of civil war claims. Due to the concerns outlined in these Guidelines, neither mode of analysis is recommended. For a review of the relevant Canadian case law and an in-depth discussion of the issue see CRDD T93-11627, T93-11628, James, Band, March 29, 1994.

For reasons that follow the comparative approach see: CRDD T92-05687, Davis, Thomas, February 9, 1993 (The panel found that the claimant's ethnic group, the Hazara, was not targeted differentially than any other ethnic group in Afghanistan. On judicial review, the application was allowed on consent and the negative decision set aside - IMM-836-93, Reed J., March 23, 1994. A positive determination was made on the rehearing of the claim.); CRDD T93-09000, T93-09143, Davis, Grice, January 14, 1994 (Positive determinations were made as the panel found that members of the claimant's religious group suffer more frequently from more atrocious human rights violations differentially from any other group.); and CRDD T93-09464, T93-09465, Davis, Wolman, January 6, 1994 (The claimants, ethnic Croats, were found not to be Convention refugees as they failed to establish that they faced a differential risk when compared to other ethnic groups in the country. A leave application for judicial review was not filed.).

In *Abdi, Jama Osman v. M.E.I.* (F.C.T.D, no. A-1089-92), Simpson, November 18, 1993, the Court stated at p. 3 that: "As a general matter, when large numbers of civilians are being killed without regards to their beliefs or affiliations, it is difficult to demonstrate a fear of persecution based on a personal belief or membership in a particular group. However, this case was unusual because there was some documentary evidence which corroborated the claimant's fear of persecution at the hands of the Abgal sub-clan." This statement illustrates the need for submission of evidence which shows the targeting of the claimant and/or her group. In addition, it recognizes that even in situations where large numbers of persons suffer harm for reasons not linked to a Convention ground, targeting for a Convention ground can take place.

16. Requiring a demonstration of greater hardship might mean any one of several things. To succeed, the claimant might have to establish: (i) that the claimant's, or her group's, level of risk is greater than the risk level of persons in other groups [rejected in *Janjicek, Davorin v. M.C.I.* (F.C.T.D., no. IMM-2242-94), Richard, March 24, 1995, but accepted in other decisions of the Trial Division]; or (ii) that the claimant's level of risk is greater than the risk level of other persons in the claimant's own group (rejected by the Court of Appeal in *Hersi, Nur Dirie*); or (iii) that the claimant is at risk of suffering harm greater than that which threatens others.

With respect to the third alternative, the question which must be addressed by the Refugee Division is whether the treatment feared crosses the threshold of what constitutes persecution, not whether the claimant is at risk of harm greater than that to which some other group, or some other person in the claimant's own group, might be subjected. The threshold should not be raised because the claim arises out of a situation of civil war; generally, it cannot be said that something which would constitute persecution in peacetime does not meet the standard in war time. Moreover, the linkage to a Convention ground should not be negated by the mere fact that the persecution arises within the context of civil war.

In *Janjicek*, the Federal Court Trial Division, on consent, ordered a claim remitted for a new hearing on the basis that "a Convention refugee claimant need not establish that her or his ethnic group is at greater risk than members of other ethnic groups, in

accordance with the decision of the Federal Court of Appeal in *Salibian v. M.E.I.*. However, in *Barisic, Rajko v. M.C.I.* (F.C.T.D., no. IMM-7275-93), Noël, January 26, 1995, the Court held that it could not conclude that the Refugee Division acted unreasonably by holding that, like all Croats, the claimant was a victim of a civil war. The Refugee Division concluded that the claimant was situated similarly to all citizens of Croatia and had not demonstrated the existence of a serious risk of persecution based on one of the reasons set out in the Convention. The claimant had been forced out of his village when it was occupied by the Serb army, and had adduced evidence of "ethnic cleansing". The Court noted that the Croats, in the spirit of revenge, were engaging in acts just as reprehensible.

17. In *Isa v. S.S.C.* (1995), 28 Imm.L.R. (2d) 68 (F.C.T.D.), the Trial Division upheld a decision of the Refugee Division (CRDD T93-01998, Mojgani, Cole, March 8, 1994) in which the panel at p. 4 concluded that:

Given the totality of the documentary evidence before us, it appears that all clans and sub-clans are both perpetrators and victims of the ongoing violence. We do not find that the claimant's clan has been differentially targeted for persecution from any other clan nor that he had been targeted any differently from any other Somali.

The claimant was found not to be a Convention refugee notwithstanding that documentary evidence described attacks on the claimant's clan. The Court did not take issue with the Refugee Division's finding that the claimant's fear was similar to that of all Somali citizens in general and arose out of the ongoing civil strife in Somalia. In particular, at p. 72 the Court stated that:

Many, if not most, civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for Convention refugee status, then, all individuals on either side of the conflict will qualify. The passages quoted by the board from [paragraph 164 of] the United Nations Handbook (*supra*) indicates that this is not the purpose of the 1951 Convention.

See also *Ali, Farhan Omar v. M.C.I.* (F.C.T.D., no. A-1652-92), McKeown, June 26, 1995 where without referring to any particular passage in *Isa*, that decision was cited approvingly. In *Ali*, the Court upheld the decision of the Refugee Division which found the claimants not to be Convention refugees as they had not shown that they were "differentially at risk of being persecuted despite the civil war situation" (at p.3). *Isa* was applied in CRDD T94-06601, T94-06602, T94-06603, T94-06604, T94-06605, T94-06606, Davis, Bubrin, August 2, 1995 where the panel in considering whether an IFA existed for the claimants held at p. 10 that Shi'ite Hazaras did not face "more or different difficulties in Afghanistan." (Application for leave for judicial review filed as IMM-2456-95 with leave granted.) For a similar analysis with respect to Pashtuns in Afghanistan see CRDD T95-02614, Davis, Hope, November 24, 1995. See also, CRDD T95-02034, Davis, Bubrin, October 13, 1995 where the Refugee Division applying a similar analysis determined that members of the Majerteen clan of the Darod tribe do not face a differential risk in Somali from other Somali citizens. (Application for leave for judicial review filed as IMM-3170-95.)

18. In *Ali, Hassan Isse v. M.E.I.* (F.C.T.D., no. IMM-39-93), MacKay, June 9, 1994, the Court notes, after referring to *Salibian* and *Rizkallah*, that *Rizkallah* "is not authority for concluding that the civil war situation in Somalia faces all Somalis indiscriminately" (p. 7) as held by the Refugee Division. In addition, the Refugee Division had

concluded "that the situation in Somalia is basically one of civil war, and that the claimant is not targeted, individually or collectively, in some way different from the general victims of civil war." The panel had not provided an explanation related to the evidence for this determination. The Court held that the panel's decision erred in not assessing the claimant's claim to a fear of persecution because of his membership in his clan, and in not referring to the particulars of the claimant's own situation. It is suggested that the Court in this case focused on the fear as it related to a Convention ground as opposed to the "differential risk" analysis found in *Abdulle, Sadia Mohamed v. M.E.I.* (F.C.T.D., no. A-1440-92), Nadon, September 16, 1993 and *Mohamud, Nasra Ali v. M.E.I.* (F.C.T.D., no. A-614-92), Nadon, January 21, 1994.

In T94-05955, Rucker, Cram, March 7, 1995 (signed October 11, 1995), the Refugee Division found the claimant, a Darod/Marjerteen from Mogadishu, Somalia, to be a Convention refugee based on the clan-based fighting due to its adverse impact on him personally, and on his clan.

19. See Suzanne J. Egan, *Civil War Refugees and the Issue of "Singling Out" in a State of Civil Unrest* (Toronto: The Centre for Refugee Studies, 1991). See also David Matas, "Innocent Victims of Civil War as Refugees", Vol. 22, Fall 1993, *Manitoba Law Journal*, p. 1.

In *Osman, Ashu Farah v. M.C.I.* (F.C.T.D., no. IMM-1295-94), Cullen, January 25, 1995, the Court upheld the Refugee Division's finding that the claimant, a Somali woman whose deceased husband was of another clan, did not have a well-founded fear of persecution by reason of her clan membership. However, the decision was overturned due to the panel's failure to consider the particular situation faced by the claimant related to her marriage which put her "at a heightened risk." In coming to its decision, the Court stated at p. 5 that the "Board cannot hide behind the civil war situation and automatically find that claimants from Somalia are not refugees." In *Hotaki, Khalilullah v. M.E.I.* (F.C.T.D., no. IMM-6659-93), Gibson, November 22, 1994, the Court found that the Refugee Division erred in failing to recognise that the "applicant was personally or differentially targeted and was not simply suffering from the fear felt indiscriminately by all citizens [of Afghanistan] as a consequence of the civil war" (at p.4).

20. While the membership of a claimant, who is a non-combatant, in a group which is a combatant in the civil war often forms the basis for her claim of a well-founded fear of persecution, it is clear that it is not determinative of the issue as the claimant must prove that the harm feared is linked to a Convention ground. In *Abdulle, Sadia Mohamed v. M.E.I.* (F.C.T.D., no. A-1440-92), Nadon, September 16, 1993, the Court rejected the applicant's submission that membership in one of two groups involved in a two-sided conflict is determinative of the issue. The Court, applying a "differential risk" analysis, a mode of analysis not recommended in these Guidelines, required proof of targeting of the applicant or her group, an approach in accord with the Guidelines. See also *Farah, Ali Said v. M.C.I.* (F.C.T.D., no. IMM-1141-94), Dubé, January 13, 1995. The Court, in concluding that the Refugee Division was not unreasonable in holding that the claimant had not established that he would be targeted for persecution in some way different from the general victims of civil war in Somalia, noted that "the mere fact that the applicant is a member of a tribe or clan in Somalia does not necessarily imply that he has an objectively well-founded fear of persecution" (at pp. 1-2).

21. *Ward* at p. 747.

22. However, see *Barisic, Rajko v. M.C.I.* (F.C.T.D., no. IMM-7275-93), Noël, January 26, 1995, where the Court in dismissing the application for judicial review noted that the Croats, in the spirit of revenge, were engaging in acts just as reprehensible as those committed by the Serb army.
23. Dr. Joachim Henkel, Judge, German Federal Administrative Court. Excerpt from his contribution to the International Judicial Conference on Asylum Law and Procedures, London, England, November 1995, "Who is a refugee? (Refugees from civil war and other internal armed conflicts)", in section titled "Persecution versus "general consequences" of civil war" at pp. 3-4.
24. *Adjei v. M.E.I.*, [1989] 2 F.C. 680 (C.A.). In *Chan, Kwong Hung v. M.E.I.* (S.C.C., no. 23813), Major, Sopinka, Cory, Iacobucci (majority); La Forest, L'Heureux-Dubé, Gonthier (dissenting), October 19, 1995, Justice Major after citing *Adjei* phrased the test as follows: "The applicable test has been expressed as a "reasonable possibility" or, more appropriately in my view, as a "serious possibility"." (p. 13). Both of these terms, as well as "reasonable chance", are found in *Adjei*.
25. The claimant in such a situation might fear persecution at the hands of members of her own group for attempting to maintain neutrality in the conflict. Alternatively, her fear could emanate from groups in conflict with her group, as the claimant could be perceived to be a supporter of her own group.

As noted at p. 750 of the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689: "Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction." At p. 749 the Court contrasted its decision in *Ward* with a recent United States Supreme Court disposition in *I.N.S. v. Elias-Zacarias*, 112 S.Ct. 812 (1992), where the majority was not convinced that the claimant's motive for refusing to join an anti-government guerilla force, nor that perceived by the guerillas to be his motive, was politically based.

26. In *Antonio, Pacato Joao v. M.E.I.* (F.C.T.D., IMM-1072-93), Nadon, September 27, 1994, the Court, in an Angolan claim, was not prepared to conclude that the death penalty, when imposed for treason and sabotage, constituted persecution. While providing indirect support to dissident forces may be subject to prosecution by the government, such prosecution must not be carried out in a persecutory manner.
27. Where the claim involves a fear of gender-related persecution, consideration of the Chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-related Persecution*, Immigration and Refugee Board, Ottawa, Canada, March 9, 1993 (the "*Gender Guidelines*") might be required. Thus, it may be necessary to use these Guidelines as well as the *Gender Guidelines* to analyze a claim of a woman fearing persecution within the context of a civil war. For a case involving a civil war situation where the panel failed to consider the *Gender Guidelines*, see *Hazarat, Ghulam v. S.S.C.* (F.C.T.D., no. IMM-5496-93), MacKay, November 25, 1994. However, in *Narvaez, Cecilia v. M.C.I.* (F.C.T.D., no. IMM-3660-94), McKeown, February 9, 1995, the Court had the following to say in a domestic violence case with respect to the *Gender Guidelines*: "While the guidelines are not law, they are authorized by subsection 65(3) of the Act, and intended to be followed unless circumstances are such that a different analysis is appropriate" (p. 6). With respect to the position of children see, *supra*, note 7.

28. See *Shirwa, Mohamed Mahmoud v. M.E.I.* (F.C.T.D., no. A-1290-92), Denault, December 16, 1993. Also, members of the clan that had ruled the country prior to the civil war might face persecution by reason of their clan membership.
29. It is recognized that in a civil war there will be civilian casualties incidental to the fighting; while regrettable, such deaths or injuries are distinct from those resulting from an attack directed at civilian non-combatants or where the combatants show wanton disregard for the safety of civilians. Evidence of such disregard might lead the Refugee Division to find that there is a link between the persecution feared and a Convention ground. For cases illustrating this issue, see, *supra*, note 14.
30. See *Khalib v. M.E.I.* (1994), 24 Imm.L.R. (2d) 149 (F.C.T.D.), *supra*, note 14. This example can be contrasted with a situation where one participant in a civil war bombs and shells an area of a town primarily inhabited by civilian non-combatants who are members of another participant in the civil war. Civilians who are not near military targets should not face direct attack by combatants. Where civilians are present in or near military targets, they may be found to have assumed the risk of death or injury incidental to attacks against such military targets.
31. This can be contrasted with the intentional infliction of harm described by Dr. Joachim Henkel. In *Abdi, Ascia Hassan v. M.C.I.* (F.C.T.D., no. A-1016-92), Noël, October 27, 1994, the Court in dismissing the application, concluded that its review of the evidence did not justify its interference with the Refugee Division's finding that "members of the Darod or Hawiye tribes, including the Applicants, were subject to the same risk of random violence as the general population of Somalia" (at p. 7).
32. In CRDD T92-03148, Miller, Shatzky, September 9, 1992, the Refugee Division determined a Bosnian Moslem to be a Convention refugee as the panel concluded that "Muslims are not merely the victims caught in the crossfire of war, but are a targeted group selected for elimination because of their religion" (p. 5).
33. *Ward* at p. 709.
34. *Ward* at p. 724.
35. See *Ward* at pp. 722-6.
36. *Zalzali v. M.E.I.*, [1991] 3 F.C. 605 (C.A.). As noted at p. 614 of the decision, the non-existence of a government cannot be an obstacle to claiming refugee status. It would be an absurd result that the greater the chaos in a given country, the less acts of persecution could be capable of founding a claim for refugee status. However, for the principle in *Zalzali* to apply, the claimant must demonstrate a prospective risk of persecution. Thus, in *Roble, Abdi Burale v. M.E.I.* (F.C.A., no. A-1101-91), Heald, Stone, McDonald, April 25, 1994, where the agent of persecution (the NSS in Somalia) was no longer a factor, the Court held at p. 9 that "...the inability of the state to protect the [claimant] is not, in itself, a sufficient basis for his claim."
37. In *Mendivil v. S.S.C.* (1994), 23 Imm.L.R. (2d) 225 (F.C.A.) at p. 232, Desjardins J.A. in analyzing the situation in Peru (on the basis of the evidence filed in the particular case) stated: "Isolated cases of persons having been victimized may not reverse the presumption [of protection]. A state of profound unrest with ineffective protection for the claimant may, however, have reversed it." In *Oblitas, Jorge v. M.C.I.* (F.C.T.D., no. IMM-2489-94), Muldoon, February 2, 1995, at p. 9, the Court goes so far as to say that while the situation in Peru due to the terrorist activities of the Shining Path is not quite one of state breakdown (as in *Zalzali*), it comes very close.

38. *Zalzali*, at p. 615 where the Court goes on to state:

The "country", the "national government", the "legitimate government", the "nominal government" will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition. I will simply note here that I do not rule out the possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them, protection which may be adequate though not necessarily perfect.

See also *Sami, Sami Qowdan v. M.E.I.* (F.C.T.D., no. A-629-92), Simpson, June 1, 1994 and *Saidi, Ahmed Abrar v. M.E.I.* (F.C.T.D., no. A-749-92), Wetston, September 14, 1993 where, in each case, the Court upheld the Refugee Division's findings that protection was available in northern Somalia.

39. The Supreme Court of Canada in *Ward* did not discuss the standard of protection that a country needs to offer its nationals. In determining what constitutes adequate protection, the Refugee Division may consider as a factor, whether the established authority is able to provide the claimant with protection from the acts prohibited by common article 3 of the *1949 Convention*. For a discussion of the appropriate standard see *M.E.I. v. Villafranca* (1992), 18 Imm.L.R. (2d) 130 (F.C.A.); *Velarde-Alvarez v. S.S.C.* (1995), 27 Imm.L.R. (2d) 88 (F.C.T.D.); *Bobrik, Iouri v. M.C.I.* (F.C.T.D., no. IMM-5519-93), Tremblay-Lamer, September 16, 1994; *Smirnov v. S.S.C.*, [1995] 1 F.C. 780 (T.D.).
40. In *Kanagaratnam, Parameswary v. M.E.I.* (F.C.A., no. A-356-94), Strayer, Linden, McDonald, January 17, 1996, the Court of Appeal in answering "no" to the certified question "Is the determination of whether a claimant has a well founded fear of persecution in the area from which he or she originates a prerequisite to the consideration of an internal flight alternative?", held at p. 2 that "while the Board may certainly do so if it chooses, there was no **need** as a matter of law for the Board to decide whether there was persecution in the area of origin **as a prerequisite** to the consideration of an IFA" (emphasis added by the Court).
41. *Rasaratnam v. M.E.I.*, [1992] 1 F.C. 706 (C.A.) at p. 710.
42. *Internal Flight: When is it an Alternative?*, IRB Legal Services, April 1994. The Commentary provides a detailed review of the issue and includes a suggested framework of analysis.
43. *Thirunavukkarasu v. M.E.I.*, [1994] 1 F.C. 589 (C.A.).
44. For an elaboration of this statement, reference should be made to *Thirunavukkarasu* at pp. 596-9.
45. In particular, in determining whether there is an objective basis for fearing persecution in the IFA region, the Refugee Division must consider the personal circumstances of the claimant, and not just general evidence concerning other persons who live there.
46. *M.E.I. v. Sharbdeen* (1994), 23 Imm.L.R. (2d) 300 (F.C.A.) at p. 301-2.
47. *Farrah, Sahra Said v. M.E.I.* (F.C.T.D., no. A-694-92), Reed, October 5, 1993 at p. 3. See also *Megag, Sahra Abdilahi v. M.E.I.* (F.C.T.D., no. A-822-92), Rothstein,

December 10, 1993 at p. 3 where the Court holds that instability alone is not the test of reasonableness. In *Irene, Steve Albert v. M.C.I.* (F.C.T.D., no. IMM-6275-93), Rothstein, October 6, 1994, the Court in considering an IFA in an area controlled by one of the groups to the conflict, did not disagree with the applicant's submission that the group was not internationally recognized, had lost territory, was not an established force in the country (Liberia) and the applicant could not reasonably claim protection from that group. In those circumstances, the Court rejected the Refugee Division's finding that an IFA existed.

48. The Trial Division has specifically addressed the issue of at what point in time IFA is to be considered. In *Dubravac v. M.C.I.* (1995), 29 Imm.L.R. (2d) 55 (F.C.T.D.) where the claimants' home town had been surrounded by opposing Serbian forces, the Court commented that the claimants "would not be required to go from their home town to the safe zone of Croatia, but ...from wherever they were relanded upon being sent back" (p. 56).
49. The *Act* provides in section 68(3) that all proceedings before the Refugee Division shall be dealt with as informally and expeditiously as the circumstances and the considerations of fairness permit.
50. In accordance with the requirements of natural justice, section 68(5) of the *Act* provides that before the Refugee Division takes notice of any facts, information or opinion, other than facts that may be judicially noticed, in any proceedings, notice of its intention must be given and a reasonable opportunity to make representations with respect thereto must be afforded to the claimant (and the Minister, if present).
51. In dismissing the application for judicial review in *Ahmed, Mohamed Hassan v. M.E.I.* (F.C.T.D., no. A-818-92), McKeown, May 20, 1994, the Court noted that "the onus is on the applicant to show that he is similarly situated to members of a social group who suffered persecution" (at p. 2).
52. See also paragraphs 195 to 205. The need to ascertain and evaluate all relevant facts is reflected in some of the enhancements to the Convention refugee determination process implemented by the Refugee Division in October 1995.

### **Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949**

Article 3 of each of the four *Geneva Conventions of 1949* set out in the schedule to the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, provides as follows:

3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

## **Protocol II to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949**

**(Schedule vi of the Geneva Conventions Act as amended by S.C. 1990, c.14, s.1)**

### **Article 4**

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages on the personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;...

### **Article 13 - Protection of the Civilian Population**

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

**Article 14 - Protection of objects indispensable to the survival of the civilian population**

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.